Supreme Court, U.S.
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(1)

No. 02 876

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,
Petitioners,

v.

PHYLLIS GARRETT AND ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether class member objectors who were denied intervention have standing to appeal an order approving a proposed settlement agreement.

Whether a denial of such class members' right to appeal violates their rights to due process and equal protection.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are Teresa Ballard, Kenisha Bryant, and Cheryl King, individual citizens of the United States. Ms. Ballard and Ms. King reside in the State of Arkansas and Ms. Bryant resided there at the time this litigation commenced. Ms. Bryant now resides in Texas. The Petitioners have no corporate affiliations. The Petitioners were objecting class members in the Circuit Court of Clark County, Arkansas and the Appellants before the Arkansas Supreme Court.

Respondents

Phyllis Garrett is an individual citizen of the United States, residing in the State of Arkansas. Ms. Garrett was the designated class representative in the Circuit Court of Clark County, Arkansas and an Appellee before the Arkansas Supreme Court.

Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America") is an Arkansas corporation and is affiliated with numerous payday-lending entities throughout the United States. Advance America was the defendant in the Circuit Court of Clark County, Arkansas and an Appellee before the Arkansas Supreme Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

I. The Decision of the Arkansas Supreme Court Conflicts with Recent Precedent from this Court 6

A. *Devlin v. Scardelletti* Applies to Classes Containing Opt-Out Provisions. 8

B. *Devlin v. Scardelletti* Applies to State Court Proceedings. 9

II. The Appellate Rule of the Arkansas Supreme Court Denies Equal Protection to the Petitioners and to All Other Similarly Situated Litigants. 11

III. The Appellate Rule of the Arkansas Supreme Court Denies Due Process to the Petitioners and to All Other Similarly Situated Litigants. 13

IV. This Question is Important due to the Potential Split Developing in the Federal Circuits 15

V. The Petitioners were Denied Due Process by not being Permitted to Examine Documents Presented to and Considered by the Trial Court. 16

VI. The Question Presented is Important. 17

CONCLUSION 18

APPENDIX IN SEPARATE VOLUME

APPENDIX A 1a

APPENDIX B 6a

APPENDIX C 12a

APPENDIX D 14a

APPENDIX E 21a

APPENDIX F 32a

TABLE OF AUTHORITIES

Federal Cases

Boddie v. Connecticut, 401 U.S. 371, 376, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971) 14

Devlin v. Scardelletti, 536 U.S. ---. 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002) ..... passim

Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963) 10, 14

Goldberg v. Kelly, 397 U.S. 254, 269-71, 90 S.Ct. 1011, 1021-22, 25 L.Ed.2d 287 (1970) 17

Gottlieb v. Wiles, 11 F.3d 1004 (C.A.10 1993) 9

Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741 (1940) 9, 10, 13

Henderson v. General American Life Ins. Co., 122 S.Ct. 2584 (Mem), 153 L.Ed.2d 773 (2002) 9

In re General American Life Ins. Co. Sales Practices Litigation, 268 F.3d 627 (8th Cir. 2001) 9, 15, 16

In re Navigant Consulting, Inc., Securities Litigation, 275 F.3d 616 (7th Cir. 2001) 16

Jenkins v. McKeithen, 395 U.S. 411, 428-29, 89 S.Ct. 1843, 1852-53, 23 L.Ed.2d 404 (1969) 17

Lindsey v. Normet, 405 U.S. 56, 77, 92 S.Ct. 862, 876 (1972) 13

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993) 11

Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979) 10, 14

Plain v. Murphy Family Farms, 296 F.3d 975 (10th Cir. 2002) 16

Richardson v. Ramirez, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974) 10, 13

State of Minnesota v. National Tea Company, 309 U.S. 551, 557, 60 S.Ct. 676, 679, 84 L.Ed. 920 (1940) 17

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988) 12

State Cases

Arkansas State Highway Commission v. Perrin, 240 Ark. 302, 305, 399 S.W.2d 287, 289-90 (1996) 12

Dootson v. State, 2000 WL 1745267 (Ark. App. 2000) 12

Hodges v. Gray, 321 Ark. 7, 901 S.W.2d 1 (1995) 12

In re $ 3,166,199, 337 Ark. 74, 79, 987 S.W.2d 663, 666 (1999) 12

In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990) 12

McCoy v. Moore, 338 Ark. 740, 741, 1 S.W.3d 11, 12 (1999) 12

Ouachita Baptist College v. Scott, 64 Ark. 349, 42 S.W. 536 (1897) 12

Federal Statutes

28 U.S.C. § 1257(a) 1

U. S. Const., Amend. V 1, 7, 10

U. S. Const., Amend. XIV 1, 7, 10, 13

State Statutes

A.C.A. § 16-11-302 ..... 1, 12

A.C.A. § 16-65-119 ..... 1, 12

Federal Rules

FED. R. CIV. P. 23.....9

State Rules

ARK. R. APP. P.-CIVIL 2.....2, 12

ARK. R. CIV. P. 23.....2, 9, 11

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The original opinion of the Arkansas Supreme Court (**App. A at 1a**) is reported at 349 Ark. 545, 79 S.W.3d 835 (2002). The opinion of the Arkansas Supreme Court denying the Petitioners' Petition for Rehearing (**App. C at 12a**) is not reported. The opinion of the Circuit Court of Clark County, Arkansas approving the proposed settlement agreement over the objection of the Petitioners (**App. B at 6a**) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Arkansas Supreme Court was entered July 5, 2002. The Arkansas Supreme Court entered its order denying the Petitioners' timely Petition for Rehearing on September 5, 2002 (Glaze, J. not participating).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

1. U. S. Const., Amend. V. (**App. E at 21a.**)
2. U. S. Const., Amend. XIV. (**App. E at 22a.**)
3. A.C.A. § 16-11-302. (**App. E at 24a.**)
4. A.C.A. § 16-65-119. (**App. E at 26a.**)

5. ARK. R. CIV. P. 23(b) and (c). **(App. E at 27a.)**

6. ARK. R. APP. P. - Civil 2. **(App. E at 29a.)**

STATEMENT OF THE CASE

This appeal arises from an order of the Circuit Court for Clark County, Arkansas, the Hon. John A. Thomas, approving - over the Petitioners' objection - a proposed class action settlement agreement. **(App. B at 6a.)**

The case began on October 12, 1999 as a suit by Respondent Garrett against Respondent Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America"). The case was certified as a class action on April 9, 2001, simultaneous notice of certification and settlement was given on or about May 23, 2001, and the Petitioners sought to intervene on July 6, 2001, which was denied as untimely. The Petitioners timely objected to the proposed settlement agreement, which proposed to pay claiming class members and their counsel $ 750,000.00 and to forgive all "NSF" checks (with alleged value of $ 550,000.00), as being inadequate, unreasonable, and unjust.[1]

Ms. Garrett submitted financial information concerning Advance America to the Court under seal and offered that information into evidence. The Petitioners were denied an opportunity to examine that information and objected to its introduction. The Petitioners submitted evidence that the amount of potential damages awardable to the class could range between $ 10,000,000.00 and $ 20,000,000.00, that Advance America's shareholders might be jointly liable for those damages and that Advance America, that its 27

[1] Respondent Advance America admitted in its Response Brief below that the remaining NSF checks it was "forgiving" under the settlement were actually worthless to Advance America, but might have value to the class members who had already received cash for them. Petitioners responded that whatever value was represented in those checks had been conveyed independently of the proposed settlement.

sureties could be liable for a total of $ 1,350,000.00 of any such award, and that its shareholders and sureties could pay any amounts awarded at trial. The trial court quashed the subpoena Petitioners issued to Advance America.

Over the Petitioners' objection, on July 18, 2001, the trial court approved the class action settlement agreement. (**App. B at 6a.**) On August 10, 2001, the Petitioners appealed the trial court orders denying intervention and approving the settlement agreement.[2]

In their Opening Brief to the Arkansas Supreme Court, the Petitioners raised the issues of due process as applied to class action proceedings. The Petitioners stated:

> When determining whether a proposed settlement agreement should be approved, the burden is on the proponents of the agreement to show that it is fair, reasonable, and adequate. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd Cir. 1995). This makes sense since it is *the proponents* who allegedly possess all of the facts underlying the negotiations and who stand to benefit from the agreement. Moreover, since the proposed settlement is intended to have *res judicata* effect as to the absent class members and class counsel bears a duty toward the class, it is only right that class counsel be called upon to demonstrate that the proposed settlement was the

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[2] The trial court subsequently entered an order requiring the Petitioners to post a $ 750,000.00 supersedeas bond in the absence of any supersedeas order. The Petitioners' appeal of that order was similarly dismissed by the Arkansas Supreme Court for lack of standing and is the subject of a companion Petition for Certiorari, No. 02-426, now pending before this Court.

Petitioners also have a Petition for Certiorari, No. 02-542, pending regarding the Arkansas Supreme Court's initial adoption and application of standards by which to gauge proposed class action settlement agreements.

subject of vigorous and independent negotiation on behalf of the class.

> Due process requires nothing less. This Court has previously held that due process considerations are relevant in the class action context. *See*, e.g., *Kemp-Bradford VFW Post 4764 v. Wood*, 262 Ark. 168, 554 S.W.2d 344 (1977) ("We do not believe the rights of the members of any class, whether alcoholic beverages are involved or not, should ever be determined without reasonable notice or without evidence that parties are adequately representative of the class."); *Ford Motor Credit Co. v. Rogers*, 285 Ark. 64, 685 S.W.2d 145 (1985).

Petitioners' Opening Brief to the Arkansas Supreme Court, p. 2. This issue, as well as that of equal protection, was also implied to the Arkansas Supreme Court by the Petitioners' specific reference to *Devlin v. Scardelletti*, 536 U.S. —, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), in Petitioners' Motion to Take Judicial Notice filed June 12, 2002 below. (**App. D at 14a.**)

On July 5 2002, the Arkansas Supreme Court dismissed the Petitioners' appeal of the order approving the settlement agreement on the grounds that they had been denied leave to intervene, were therefore not parties to the proceedings, and hence had no standing as objecting class members to appeal from that order. (**App. A at 1a.**) The court said:

> However, because we found appellants did not timely intervene, appellants do not have standing to bring this appeal. In *Devlin v. Scardelletti et al.*, WL 1270617 (June 10, 2002), the United States Supreme Court determined that unnamed class members, who have objected in a timely manner to approval of a class action settlement at the fairness hearing, have the power to bring an appeal without first intervening, abrogating the lack of standing issue. However, *Devlin* involves facts and issues that are

distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure. In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections.

Accordingly, the *Devlin* opinion is distinguishable from this case on appeal, and this court's opinion in *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994), continues to be the controlling precedent in Arkansas. In *Haberman*, the court found that for unnamed class members to have standing to appeal a class-action settlement in state court, those class members must have intervened at the trial court level. *Haberman, supra.* Non-parties and unnamed members of the class who have failed to intervene are precluded from appealing a class settlement. *Haberman, supra.*

Throughout this litigation, appellants have conceded that *Haberman* is the applicable and controlling law. At a hearing before the circuit court on September 5, 2001, counsel for appellants stated "[t]he Haberman decision from the Arkansas Supreme Court makes it very clear that in order for a party to appeal a settlement agreement, they must be an intervenor. That is the law." Appellants have now changed their position and suggest that *Devlin* gives them the ability to appeal the settlement approval in this case without first intervening. We disagree and continue to follow *Haberman*.

Unlike the petitioner in *Devlin*, appellants here had the ability to opt out of the settlement and avoid

being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants willingly undertook the risk that their motion to intervene might be defied for failure to meet the requirements of Rule 24 (a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal. Therefore, by following *Haberman,* appellants have no standing; thus the appeal is dismissed.

Opinion of the Supreme Court of Arkansas. **(App. A at 1a.)**

The Petitioners asked the Arkansas Supreme Court to reconsider its dismissal of their appeal of the trial court's order approving the Respondents' settlement agreement **(App. F at 32a)** and that Petition for Rehearing was denied on September 5, 2002 **(App. C at 12a)**.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Arkansas Supreme Court Conflicts with Recent Precedent from this Court.

The Arkansas Supreme Court unequivocally held that unnamed class members who have not successfully intervened are <u>without standing</u> to appeal a trial court order requiring them to post a supersedeas bond. The Arkansas Supreme Court said:

> However, because we found appellants did not timely intervene, <u>appellants do not have standing to</u>

bring this appeal. In *Devlin v. Scardelletti, et al.*, WL 1270617 (June 10, 2002), the United States Supreme Court determined that unnamed class members, who have objected in a timely manner to approval of a class action settlement at the fairness hearing, have the power to bring an appeal without first intervening, abrogating the lack of standing issue. However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure. In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections. (Emphasis added) **(App. A at 3a.)**

On June 10, 2002, this Court decided *Devlin v. Scardelletti*, 536 U.S. —, 122 S.Ct. 2005, 153 L.Ed.2d 27 (June 10, 2002). That case held, *inter alia*, that an unnamed class member who timely objects to the terms of a class action settlement has standing to appeal and is a "party" who may appeal. This Court's decision in *Devlin* was timely brought to the attention of the Arkansas Supreme Court by the Petitioners **(App. D at 14a)** and the issues it raised were considered and ruled upon by that court. **(App. A at 1a; App. C at 12a.)**

The decision of the Arkansas Supreme Court in this case specifically and categorically rejected *Devlin, id.* As a result, it created in Arkansas a standard for objecting class members that is not only inconsistent with *Devlin*, but (for the reasons set forth there) denies them due process and equal protection afforded under the Fifth and Fourteenth Amendments to the United States Constitution.

A. *Devlin v. Scardelletti* Applies to Classes Containing Opt-Out Provisions.

One reason given by the Arkansas Supreme Court for distinguishing this case from *Devlin* is that it involved a non-opt-out class while the class in the instant case contained an opt-out provision. In explicitly rejecting *Devlin*, the Arkansas Supreme Court said:

> ... the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections.
>
> * * *
>
> Unlike the petitioner in *Devlin*, appellants here had the ability to opt out of the settlement and avoid being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants willingly undertook the risk that their motion to intervene might be defied for failure to meet the requirements of Rule 24 (a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal. Therefore, by following *Haberman*, appellants have no standing; thus the appeal is dismissed. **(App. A at 3a-5a.)**

With the utmost respect toward the Arkansas Supreme Court, the Petitioners believe it misconstrued *Devlin*. This Court spent only one sentence in *Devlin* referring to the

absence of an opt-out provision and did so only to emphasize the correctness of the rest of its reasoning.

This Court subsequently held on June 17, 2002 that the presence of an opt-out provision was a distinction without a difference in applying *Devlin*. See, *Henderson v. General American Life Ins. Co.*, 122 S.Ct. 2584 (Mem), 153 L.Ed.2d 773 (2002), reversing and remanding *In re General American Life Ins. Co. Sales Practices Litigation*, 268 F.3d 627 (8th Cir. 2001). This result makes sense because a class member's standing arises from the due process considerations that permit a representative to adjudicate class members' rights in the first place, not as a result of whether there is an opt out provision. See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741 (1940). Accordingly, the Arkansas Supreme Court's rationale on this point must be rejected.

Moreover, in granting certiorari "to resolve a disagreement among the Circuits as to whether nonnamed class members who fail to properly intervene may bring an appeal of the approval of a settlement" (*Devlin* at 2008), this Court used as an example at least one case that provided for class member opt-outs. *See, e.g., Gottlieb v. Wiles*, 11 F.3d 1004 (C.A.10 1993). This implies to Petitioners that this Court deemed the presence or absence of opt-out rights immaterial in deciding this question.[3]

B. *Devlin v. Scardelletti* Applies to State Court Proceedings.

The other reason given by the Arkansas Supreme Court for distinguishing and rejecting *Devlin* is that *Devlin* dealt with issues arising under FED. R. CIV. P. 23 while the instant case arose under ARK. R. CIV. P. 23. The court said:

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[3] Potential confusion among the Circuits is already appearing over this issue and will be discussed below.

> However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure.

Opinion of Arkansas Supreme Court. (**App. A at 3a.**)

That justification must also be rejected here. In the first place, this Court has held that state class action rules are subject to federal constitutional protections. *Richardson v. Ramirez*, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974); *Hansberry v. Lee, supra.* That would presumably encompass both the due process and equal protection guarantees arising under the Fifth and Fourteenth Amendments. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963). The federal constitutional issues of due process and equal protection were timely raised by the Petitioners and were ruled upon by the Arkansas Supreme Court, thereby allowing this Court to exercise jurisdiction in this matter. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

In the second place, the Petitioners submit that the issue of one's standing to appeal a decision arising out of a state class action proceeding is not, strictly speaking, a Rule 23 procedural issue... It is an issue involving the substantive principles of due process and equal protection. Due process is involved since unnamed class members are entitled to those protections before their rights may be affected in the proceeding and equal protection is involved to the extent they are denied the right to appeal otherwise afforded to similarly situated litigants. If those rights are violated - even under a state rule of procedure - this Court may fashion a remedy.

II. The Appellate Rule of the Arkansas Supreme Court Denies Equal Protection to the Petitioners and to All Other Similarly Situated Litigants.

Petitioners have standing to petition this Court for redress of equal protection violations. See, e.g., *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993). Even though the Petitioners have a direct interest in the outcome of this litigation, the Arkansas appellate rule in question will also affect all future objecting class members in the State and will deny them equal protection on several fronts: (1) Given their standing as unnamed, objecting class members, they will be denied appellate review that is being otherwise afforded to named parties in class action proceedings; (2) They will be denied appellate review that is being otherwise afforded to class members in non-opt-out classes; and (3) As persons whose pecuniary interests are affected by the fairness order, they will be denied appellate review afforded to non-parties in other contexts.

Named parties to a class action proceeding in Arkansas or intervenors therein are afforded access to that state's appellate courts. See, e.g., *Haberman v. Lisle*, 318 Ark. 177 884 S.W.2d 262 (1994). The Petitioners have been denied appellate review solely because they are non-intervening unnamed class members. This illustrates the anomaly inherent in this objectionable practice under Arkansas law: ARK. R. CIV. P. 23(c)(2) requires that all classes be opt-out classes, which means that all objecting class members will be denied the right to appeal (unless they have been permitted to intervene, of course) and left solely with the choice of accepting what's offered under the settlement or opting out and trying to obtain adequate relief independently of the class. At the same time, ARK. R. CIV. P. 23(c)(4) provides that the notice to them disclose that "any member who does not request exclusion may, if the member desires, participate in the litigation, either in person or through counsel", while these class members may - in the discretion of the trial court

- be denied participation "as parties", i.e., intervenors, and be denied access to appellate review.

In the broader context of non-class action proceedings, the Arkansas Supreme Court has long recognized the right of unnamed parties to appeal where their pecuniary interests are affected by an order of a lower court. See, e.g., *Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S.W. 536 (1897); *In the Matter of Allen*, 304 Ark. 222, 800 S.W.2d 715 (1990) (trial court's order directing witness to pay $ 10,000 toward care of ward exceeded court' jurisdiction); *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995) (attorney for party permitted to appeal criminal contempt citation against him); *Arkansas State Highway Commission v. Perrin*, 240 Ark. 302, 305, 399 S.W.2d 287, 289-90 (1996) ("No one is aggrieved except the [Highway] commission, and, whether technically a party or not in the County court, appellant certainly is the one affected by the court order. This court has long recognized the right of one who feels aggrieved by an order of a court, to appeal to a higher tribunal."); *In re $ 3,166,199*, 337 Ark. 74, 79, 987 S.W.2d 663, 666 (1999) (appeal of Arkansas Highway Patrol allowed to claim portion of res in proceeding to which it was not a named party); *McCoy v. Moore*, 338 Ark. 740, 741, 1 S.W.3d 11, 12 (1999) (appeal dismissed because not timely filed); *Dootson v. State*, 2000 WL 1745267 (Ark. App. 2000) (witness cited for contempt allowed to appeal).

This result is consistent with this Court's reasoning in *Devlin* and other cases. *See, e.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76, 108 S.Ct. 2268, 101 L.Ed.2d 69 (1988). It is also consistent with extant laws of Arkansas dealing with the right of appeal. For example, Ark. R. App. P. - Civil 2 does not limit the right of an appeal to a "party." See also, A.C.A. §§ 16-11-302 and 16-65-119.

This Court has stated:

> When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin v. Illinois, supra; Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961); *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 788, 9 L.Ed.2d 892 (1963); *Long v. District Court of Iowa*, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966); *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969). Cf. *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); *Ellis v. United States*, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958).

Lindsey v. Normet, 405 U.S. 56, 77, 92 S.Ct. 862, 876 (1972).

The Petitioners are arbitrarily being denied the right to appeal otherwise afforded named class members and afforded persons whose pecuniary interests are affected solely because of their status as non-intervening, objecting class members. This misguided rule appears to be a relic of the pre-*Devlin* confusion between the Circuit Courts of Appeal on this issue that just refuses to pass away. No good reason for this disparity is evident or can withstand examination under the Fourteenth Amendment's gaze.

III. The Appellate Rule of the Arkansas Supreme Court Denies Due Process to the Petitioners and to All Other Similarly Situated Litigants.

If Petitioners are "parties" sufficiently to permit the trial court to enter an order determining their rights, they ought to be entitled to due process.

As stated above, this Court has held that state class action rules are subject to federal constitutional protections. *Richardson v. Ramirez*, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974); *Hansberry v. Lee, supra* ("In all such cases, so far as it can be said that the members of the class

who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit."); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963). The federal constitutional issue of due process was timely raised by the Petitioners and was ruled upon by the Arkansas Supreme Court, thereby allowing this Court to exercise jurisdiction in this matter. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979). This Court has previously stated:

> Thus, this Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." (Emphasis added.)

Boddie v. Connecticut, 401 U.S. 371, 376, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971).

The Petitioners were given notice of the proposed settlement and their right to object to it and be heard. They were denied the right to examine Advance America's financial information, which was central to the most important settlement factor: The amount offered in settlement compared to the potential judgment. The Petitioners' subpoena of Advance America was quashed. The balance of the evidence offered by Garrett in support of the proposed settlement was hearsay, yet it was approved in

the face of credible evidence that the case was worth far more than the settlement offered. The trial court made no specific findings of fact on the merits of the settlement from which the appellate court could determine whether there had been an abuse of discretion. Instead, the Petitioners were simply denied appellate review entirely.

In essence, the Petitioners are being denied due process because the Arkansas rules of standing are being used to subject them to obligations in its judicial system, while denying them access to the appellate courts.

IV. This Question is Important due to the Potential Split Developing in the Federal Circuits.

As discussed above, the Arkansas Supreme Court incorrectly relied on and misconstrued one sentence from this Court's decision in *Devlin* for the proposition that this Court would have decided *Devlin* differently if it concerned an opt-out class. The sentence relied upon is:

> Particularly in light of the fact that petitioner had no ability to opt out of the settlement, see Fed. Rule Civ. Proc. 23(b)(1), appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.

Devlin, 122 S.Ct. at 2011.[4]

Subsequently, this Court reversed and remanded the cases of *In re General American Life Ins. Co. Sales Practices*

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[4] This logic is no less compelling in the opt-out context where each class member holds a small claim. Objectors in such cases act for the benefit of the class no less than the named representative insofar as it is *the class* who benefits from those efforts.

Litigation, 268 F.3d 627 (8th Cir. 2001)[5] (an opt-out case), and *In re Navigant Consulting, Inc., Securities Litigation*, 275 F.3d 616 (7th Cir. 2001)[6] (opt-out status unknown) both of which involved appeals by objecting, non-intervening class members. In *General American, supra*, on remand the Eighth Circuit Court reviewed with approval the reasoning of the Arkansas Supreme Court in the instant case for the proposition that *Devlin* should not apply to opt-out classes (dismissing on other grounds), while the Tenth Circuit Court has applied *Devlin* without any attempt to distinguish it on that basis. See, *Plain v. Murphy Family Farms*, 296 F.3d 975 (10th Cir. 2002). It is apparent, therefore, that at least one Circuit Court of Appeal, the Eighth, is already tempted not to follow *Devlin* in the context of opt-out classes and that a split may already be developing.[7]

V. The Petitioners were Denied Due Process by not being Permitted to Examine Documents Presented to and Considered by the Trial Court.

When the trial court received financial information from Ms. Garrett and/or Advance America under seal, it should not have considered it for purposes of decision without giving the Petitioners an opportunity to examine it and test its authenticity, relevance, and probative value. Ms. Garrett and Advance America laid no foundation for the admission of that evidence and Petitioners timely objected to it and requested an opportunity to examine it and argue from it. The denial of that examination was a violation of the

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[5] See, *Henderson v. General American Life Ins. Co.*, 122 S.Ct. 2584 (Mem), 153 L.Ed.2d 773 (2002).

[6] See, *Grimes v. Navigant Consulting, Inc.*, 122 S.Ct. 2584 (Mem), 153 L.Ed.2d 774 (2002).

[7] The Eighth Circuit's decision in *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992) was the basis for the Arkansas Supreme Court's decision in *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994). *Haberman* (and by implication, *Croyden)* is still the basis for the Arkansas Supreme Court's decision below.

Petitioners' due process rights. *Goldberg v. Kelly*, 397 U.S. 254, 269-71, 90 S.Ct. 1011, 1021-22, 25 L.Ed.2d 287 (1970); *Jenkins v. McKeithen*, 395 U.S. 411, 428-29, 89 S.Ct. 1843, 1852-53, 23 L.Ed.2d 404 (1969).

Given the fact that the class' underlying claims were based on violations of the Arkansas Constitution's prohibition against usury (which provides for double damages and forgiveness of outstanding debt), the contents of those records were directly relevant to the amount of damages the class might recover as well as to Advance America's ability to pay. Both of these factors are central to consideration of the adequacy of a class action settlement's terms. Moreover, to the extent those documents might reveal payment of dividends or other transfers to Advance America's shareholders, they could have shed some light on the ability of those parties to pay an eventual judgment.[8] The absence of any meaningful findings arising from the hidden financial records is further grounds for finding a violation of due process. *Goldberg v. Kelly, supra* at 271, 1022.

VI. The Question Presented is Important.

This Court has stated that it, and not the state courts, is to be the final arbiter of federal constitutional questions and may make such disposition of the case as justice requires. *State of Minnesota v. National Tea Company*, 309 U.S. 551, 557, 60 S.Ct. 676, 679, 84 L.Ed. 920 (1940).

The rule adopted by the Arkansas Supreme Court as to non-intervening objecting class members eliminates their access to the appellate courts of the State for <u>all</u> purposes and will affect their rights in all future class litigation. The fact that the Arkansas Supreme Court's opinions dismissing

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[8] Advance America's shareholders and sureties were released under the settlement agreement even though they had not been sued and contributed nothing toward the settlement fund. Petitioners argued this result was inequitable to the class.

the Petitioners' appeals of the trial court orders approving the settlement agreement and ordering a supersedeas bond have been designated for publication demonstrates that court's intention to apply those decisions in future class action litigation. Moreover, those decisions ignore completely the denial of due process resulting from the Petitioners' preclusion from examining Advance America's financial information.

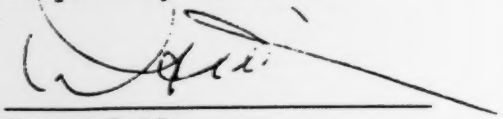
Objecting class members or class members subjected to other orders of the trial court cannot predict with any certainty whether they will be allowed to intervene and yet they will continue to be subject to orders affecting their property or liberty interests. If intervention is allowed to remain as the key to the Arkansas Supreme Court's chambers, these class members' due process and equal protection rights will be granted or denied in the discretion of the trial court. Petitioners, in No. 02-542, have also requested this Court to ensure that there be objective standards by which to judge the exercise of such discretion. These rights should be absolute and assured to all who are affected by those proceedings.

CONCLUSION

If the Petitioners, who timely objected to the proposed settlement and appealed from the order approving it, have enough standing for due process to permit a trial court to enter its order determining their property rights and cutting off their ability to sue non-parties (Advance America's shareholders and sureties), it is a denial of due process to deny them an opportunity to be heard on appeal. Moreover, since the courts of Arkansas permit appeals by named class members and defendants in class actions and by non-parties whose pecuniary and liberty interests are implicated by a trial court's order in other settings, the Petitioners and all future objecting class members are being denied equal protection under the law if they are arbitrarily denied the same rights of appeal.

The Petitioners respectfully request this Court to enter its order reversing and remanding these proceedings to the Arkansas Supreme Court for proceedings in conformity with this Court's ruling.

Respectfully Submitted:



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Teresa Ballard, Kenisha Bryant,
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s:\check cashing cases\state actions\garrett v. advance america, no. ca 01-1190 (appeal-settlement)\u.s. supreme court\certiorari, petition.doc

APPENDIX

The Appendix is in a separate volume submitted herewith.

(2)

Supreme Court, U.S.
FILED

No. _____ 02 876 DEC 4 2002

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,

Petitioners,

v.

PHYLLIS GARRETT AND ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Appendix to
PETITION FOR WRIT OF CERTIORARI

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41 pp

APPENDIX A

SUPREME COURT OF ARKANSAS
No. 01-1190

TERESA BALLARD, ET AL., **APPELLANTS,** **VS.** **ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC., AND PHYLLIS GARRETT,** **APPELLEES,**	**Opinion Delivered JUL 05 2002** **APPEAL FROM THE CLARK COUNTY CIRCUIT COURT, NO. CIV 99-152 HON. JOHN ALEXANDER THOMAS JUDGE,** **DISMISSED.**

W.H. "DUB" ARNOLD, Chief Justice

This appeal arises from an order of the Clark County Circuit Court approving a settlement of all possible claims against appellee Advance America, Cash Advance Centers of Arkansas, Inc., and all of its officers, shareholders, and sureties for cash in the amount of $750,000 and forgiveness of approximately $550,000 in checks it held that had been returned unpaid due to insufficient funds.

The case began as a class action usury suit that was filed by appellee, Phyllis Garrett, against appellee, Advance America Cash Advance Centers of Arkansas, Inc., on October 12, 1999. On April 9, 2001, a conditional settlement class was certified, and on May 2, 2001, a proposed settlement agreement was preliminarily approved, and notice was given to class members. This notice informed the members that a fairness hearing would be held on July 18,

2001, and that potential class members were given until June 30, 2001, to opt out of the class.

Appellants, Teresa Ballard, Cheryl King, and Kenisha Bryant, filed a motion seeking to intervene in the action on July 6, 2001. On July 16, 2001, a hearing was held on appellants' motion. On July 18, 2001, the trial court found that appellants' motion to intervene was untimely, that appellants' interest was adequately represented, and the trial court denied the motion to intervene.

On July 18, 2001, the previously scheduled fairness hearing was held. Following the fairness hearing, the settlement was approved and appellants' appealed from the trial court's denial of their motion to intervene. This court affirmed the trial court in *Ballard v. Garrett*, ____ Ark. _____S.W.3d ____ (June 20, 2002).

In that case, this court upheld the trial court's order that appellants' motion to intervene was filed after the litigation had progressed too far, and held that there was no abuse of discretion by the trial court. *Id.* We stated that appellants sat on their rights and waited until they were not satisfied with the way the litigation was progressing. *Id.* We concluded that the trial court did not abuse its discretion when it determined that the proceedings had advanced so far that appellants' motion to intervene was not timely. *Id.* Further, we found that allowing the intervention would have delayed the entry of the proposed settlement and would have delayed the class members' ability to collect their compensation. *Id.* Finally, in that case, we concluded that appellants did not have a valid reason for delaying the filing of their motion to intervene until fifteen months after the litigation had begun or two months after a proposed settlement had been reached. *Id.* Accordingly, we held that the trial court did not err in denying appellants' motion.

Therefore, in *Ballard v. Garrett*, we held that the trial court did not abuse its discretion when it found that appellants' motion to intervene was untimely. This court

stated the trial court did not abuse its discretion because (1) appellants waited until the litigation had progressed too far before they filed their motion to intervene; (2) the granting of appellants' untimely motion would have caused the other parties to the litigation to suffer prejudice; and (3) appellants failed to provide a valid reason for their delay in filing their motion to intervene.

While *Ballard v. Garrett* was pending before this court, Teresa Ballard, Cheryl King, and Kenisha Bryant filed another appeal with this court, also from Clark County Circuit Court. In this appeal, appellant raised four points: (1) the trial court abused its discretion in finding that the settlement agreement was fair, reasonable, and adequate; (2) the trial court abused its discretion in naming Garrett as class representative and naming her attorneys as class counsel; (3) the trial court erred in admitting and excluding certain evidence; and (4) the trial court erred in quashing the appellants' subpoena on Advance America, denying them the right to cross-examine witnesses and refusing to allow them to review and argue from a plaintiff's sealed exhibit.

However, because we found appellants did not timely intervene, appellants do not have standing to bring this appeal. In *Devlin v. Scardelletti et al.*, WL 1270617 (June 10, 2002), the United States Supreme Court determined that unnamed class members, who have objected in a timely manner to approval of a class action settlement at the fairness hearing, have the power to bring an appeal without first intervening, abrogating the lack of standing issue. However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure. In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead

elected to object to the settlement and risk being bound by it, if approved by the court over their objections.

Accordingly, the *Devlin* opinion is distinguishable from this case on appeal, and this court's opinion in *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994), continues to be the controlling precedent in Arkansas. In *Haberman*, the court found that for unnamed class members to have standing to appeal a class-action settlement in state court, those class members must have intervened at the trial court level. *Haberman, supra.* Non-parties and unnamed members of the class who have failed to intervene are precluded from appealing a class settlement. *Haberman, supra.*

Throughout this litigation, appellants have conceded that *Haberman* is the applicable and controlling law. At a hearing before the circuit court on September 5, 2001, counsel for appellants stated "[t]he Haberman decision from the Arkansas Supreme Court makes it very clear that in order for a party to appeal a settlement agreement, they must be an intervenor. That is the law." Appellants have now changed their position and suggest that *Devlin* gives them the ability to appeal the settlement approval in this case without first intervening. We disagree and continue to follow *Haberman*.

Unlike the petitioner in *Devlin*, appellants here had the ability to opt out of the settlement and avoid being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants willingly undertook the risk that their motion to intervene might be denied for failure to meet the requirements of Rule 24(a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this

appeal. Therefore, by following *Haberman*, appellants have no standing; thus the appeal is dismissed.

Appeal dismissed.

GLAZE, J., not participating.

APPENDIX B

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS

PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons — PLAINTIFF

CIV-99-152

VS.

ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC. — DEFENDANT

(Filed July 18, 2001)

FINAL JUDGMENT AND ORDER OF DISMISSAL

This matter came on for hearing on July 18, 2001, upon the application of counsel for the Parties for Final Approval of the settlement set forth in the Class Settlement Stipulation dated May 2, 2001 (the "Settlement Stipulation"). Due and adequate notice having been given to the Conditional Settlement Class defined below, and the Court having considered the Settlement Stipulation, all papers filed and proceedings had herein and all oral and written objections and comments received regarding the proposed settlement, and good cause having been shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLOWS:

1. For purposes of this final Judgment and Order of Dismissal (the "Final Judgment"), the court adopts and incorporates herein by reference all defined terms set forth in the Settlement Stipulation.

2. Upon joint motion of the Parties and upon finding that all requirements of Arkansas Rule of Civil Procedure 23(a) and (b) are satisfied, the Court certified a Conditional Settlement Class on April 9, 2001, for settlement purposes only. The Conditional Settlement Class consists of all customers who have engaged in Check Cashing Transactions with Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America'), pursuant to the Arkansas Check Cashers Act, exclusive of any customers who have timely requested exclusion from the Conditional Settlement Class under Arkansas Rule of Civil Procedure 23 and the terms of the Settlement Stipulation. The Settlement Period is June 1, 1999, through and including May 15, 2001.

3. The Court further finds that Plaintiff, Phyllis Garrett, and Class Counsel, Todd Turner, are adequate class representatives under Arkansas Rule of Civil Procedure 23(a)(4).

4. The Court approves the Parties' designation of Bowman and Brooke LLP, Post Office Box 584, Richmond, Virginia 23218-0584, as Claims Administrator.

5. The Court finds that the mailing and posting of the Notice of Pendency and Settlement of Class Action (the "Notice"), in accordance with the Notice Order entered on May 2, 2001, constitute the best notice practicable under the circumstances to all persons who are members of the Conditional Settlement Class, and fully satisfies the requirements of Arkansas Rule of Civil Procedure 23(c), due process under the Arkansas and United States Constitutions and any other applicable law.

7. Pursuant to and in accordance with the requirements of Arkansas Rule of Civil Procedure 23(e), the

Court approves the settlement of the Litigation as set forth in the Settlement Stipulation, and each of the releases and other terms set forth therein, as fair, reasonable and adequate to the Conditional Settlement Class. The Parties to the Settlement Stipulation shall complete and finalize the settlement in accordance with the terms of the Settlement Stipulation.

8. Except for claims by persons who have validly and timely requested exclusion from the Conditional Settlement Class, all claims that are asserted, or could have been asserted, in the Litigation against Advance America or Related Parties are dismissed with prejudice, with each Party bearing their own costs.

9. Each member of the Conditional Settlement Class is hereby deemed to have fully, finally and forever released and discharged all Released Claims against all Released Persons, whether or not such class member files a Proof of Claim with the Claims Administrator. The Released Claims include, without limitation, all claims, demands, rights, liabilities and causes of action of every kind and description whatsoever, whether known or unknown, that are asserted or could have been asserted in the Litigation against any of the Released Persons arising out of Check Cashing Transactions conducted by Advance America or Related Parties during the Settlement Period, including without limitation, all claims of: usury, unlawful, unfair or deceptive trade practices under state or federal law; violation of the federal Fair Debt Collection Practices Act, other federal law or state law dealing with unfair or improper collection practices; violation of the federal Racketeering Influenced and Corrupt Organizations Act or similar state law; conspiracy, violation of the federal Truth in Lending Act, other federal law or state law dealing with disclosure of credit terms; violation of the federal Equal Opportunity Credit Act or similar state law; violation of the federal Fair Credit Reporting Act or similar state law; violation of the federal Financial Right to Privacy Act or similar state law; violation of the Arkansas Check Cashers Act or any regulation promulgated thereunder; breach of contract; negligence; gross negligence; fraud or misrepresentation;

unconscionability; intentional, willful or wanton conduct; punitive damages; contribution; indemnification; and all other alleged violations of federal, state, or local statutes, constitutional provisions, rules, regulations or common law arising out of Check Cashing Transactions conducted during the Settlement Period.

10. In accordance with the Settlement Stipulation, all members of the Conditional Settlement Class are hereby ordered to dismiss with prejudice all actions, lawsuits, or claims filed or brought in their own names, or as putative class representatives, in any other court, administrative tribunal or other forum, asserting any of the Released Claims against any of the Released Persons.

11. All members of the Conditional Settlement Class are permanently barred and enjoined from filing or prosecuting, in any capacity and in any court, administrative tribunal or other forum, any action or proceeding with involves or asserts any of the Released Claims against any of the Released Persons.

12. Advance America is hereby deemed to have fully, finally and forever released and discharged each member of the Conditional Settlement Class from any claims, lawsuits, or causes of action relating to or arising out of NSF Transactions that were unpaid as of May 2, 2001, the date of the Settlement Stipulation.

13. In accordance with the Settlement Stipulation, Advance America is ordered to dismiss with prejudice the arbitration appeal currently pending in this action before the Arkansas Supreme Court, and to dismiss with prejudice any collections actions or appeals of collections actions that are currently pending in Arkansas courts between Advance America and any member of the Conditional Settlement Class.

14. All persons who have filed valid and timely Requests for Exclusion from the Conditional Settlement Class

are identified on Schedule "A" attached hereto and shall not be bound by this Final Judgment or the Settlement Stipulation.

15. The Court approves as fair and reasonable Class Counsel's attorneys fees and costs as set forth in the Settlement Stipulation, which shall be paid by the Claims Administrator from the cash contribution made by Advance America to fund the settlement.

16. The Court retains continuing jurisdiction over the Litigation, the Plaintiff, the Conditional Settlement Class and the Defendant for the purposes of supervising the implementation, enforcement, construction and interpretation of the settlement Stipulation.

"s/John A. Thomas"
Circuit Court Judge
Date: July 18, 2001

Filed for Record 18th
day of July 2001 at
4:00pm O'Clock by
"s/Pamela King"
PAMELA D. KING,
~~Deputy~~ Clerk

APPROVED AND AGREED:

"s/Todd Turner"
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Morgan & Turner
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Class Counsel

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Attorneys for Advance America,
Cash Advance Centers of Arkansas, Inc.

APPENDIX C

Leslie W. Steen, Clerk

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Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

September 5, 2002

David Glen Nixon
Paige E. Young
The Nixon Law Firm
2340 Green Acres Road, Suite 12
Fayetteville, AR 72703

RE: 01 1190 Teresa Ballard et al. v. Advance America et al.

Dear Attorneys:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied. Glaze, J., not participating."

Sincerely,

"s/Leslie W. Steen"
Leslie W. Steen, Clerk

LWS:jko

cc: Claire S. Hancock

Todd M. Turner
Richard A. Fisher
Jimmy W. Bilbo
Robert M. Buell
Betty L. Clower, clerk
(CIV-99-152)

APPENDIX D

IN THE SUPREME COURT OF ARKANSAS

TERESA BALLARD; KENISHA BRYANT;
CHERYL KING; and CRYSTAL LUEBBERS APPELLANTS

PHYLLIS GARRETT, individually, and o/b/o No. 01-1190
a class of similarly situated persons; and
ADVANCE AMERICA, CASH ADVANCE CENTERS OF
ARKANSAS, INC. APPELLEES

(FILED JUNE 12, 2002)

Motion To Take Judicial Notice

COME NOW, Teresa Ballard, Kenisha Bryant, and Cheryl King, Appellants herein, by and through their attorneys of record, THE NIXON LAW FIRM, and in support of their motion would show the Court as follows:

1. That currently pending before this Court is Appellants' appeal of the approval of settlement in *Luebbers v. Advance America Cash Advance Centers of Arkansas, Inc.* (Appeal No. 01-1190).

2. That Appellees have argued that this Court should apply *Haberman, infra* and *Croyden, infra* and dismiss this appeal because Appellants are without standing to appeal this issue because they are not parties who may take independent action in the underlying class action, Appellants having been denied intervention which has not yet been reversed by this Court.

3. That this Court in its opinion in the case of *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994) relied on *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992) for the premise that unnamed class members lack standing to appeal a decision approved by the class representatives.

4. That on June 10, 2002, the United States Supreme Court issued its opinion in *Devlin v. Scardelletti, et al.*, 536 U.S. _____(2002)[1] and determined that unnamed class members who have objected in a timely manner to approval of a class action settlement at the fairness hearing have the power to bring an appeal without first intervening, abrogating the "lack of standing" issue advanced by *Croyden* and *Haberman*. The U.S. Supreme Court's opinion is submitted contemporaneously with this motion.

5. That Appellants meet the tests set forth in *Devlin v. Scardelletti, et al., id.* permitting them to appeal an adverse determination in the trial court.

6. That Appellants respectfully request leave to supplement their prior filings in this proceeding to bring to the attention of this Honorable Court this recent decision by the United States Supreme Court, which has a direct bearing upon the issues pending in this matter.

WHEREFORE, premises considered, the Petitioners Teresa Ballard, Kenisha Bryant, and Cheryl King respectfully request this Court to take judicial notice of the United States Supreme Court decision of *Devlin v. Scardelletti, et al.*, 536 U.S. _____(2002) which has a direct bearing on the issues before this Court and to grant them such other and further relief to which they may be entitled.

Respectfully Submitted:
"s/David G. Nixon
David G. Nixon (ABA #88048)
Paige E. Young (ABA #99123)

---

[1] 2002 WL 1270617

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Fax: (501) 582-0030

Attorneys for Appellants Teresa Ballard, Kenisha Bryant, and Cheryl King

Certificate of Service

I, David G. Nixon, do hereby certify that on the 11th day of June 2002 I caused a true and correct photocopy of the within and foregoing document, with exhibits, if any, to be served on those persons shown below via U.S. First Class Mail, to wit:

Hon. John A. Thomas
CLARK COUNTY CIRCUIT JUDGE
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Arkadelphia, AR 71923

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Claire Hancock
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Riverfront Plaza - West Tower
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"s/David G. Nixon"
David G. Nixon

IN THE SUPREME COURT OF ARKANSAS

TERESA BALLARD; KENISHA BRYANT;
CHERYL KING; and CRYSTAL LUEBBERS
APPELLANTS

No. 01-1190

PHYLLIS GARRETT, individually, and o/b/o
a class of similarly situated persons; and
ADVANCE AMERICA, CASH ADVANCE CENTERS
OF ARKANSAS, INC. APPELLEES

Brief in Support of Motion To Take Judicial Notice

COME NOW, Teresa Ballard, Kenisha Bryant, and Cheryl King, Appellants herein, and submit this Brief in support of their motion filed contemporaneously herewith:

1. **Appellants are parties for the purposes of appealing approval of the settlement.**

Currently pending before this Court is Appellants' appeal of the settlement in *Luebbers v. Advance America Cash Advance Centers of Arkansas, Inc.*, (Appeal No. 01-1190). Appellants are unnamed class members who were denied their motion to intervene and who had filed their notice of objections to the proposed settlement on July 6, 2001. Despite the objections entered during the fairness hearing of July 18, 2001, the trial court approved the settlement as it had been proposed, from which this appeal follows.

Appellees argue that this appeal should be dismissed pursuant to *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994) (unnamed class members lack standing to appeal a decision approved by the class representatives where Appellants' motion to intervene had been denied by the trial

court). *Haberman* was an extension of the precedent set by the Eighth Circuit Court of Appeals in *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992). Appellants submit that a recent decision by the United States Supreme Court has abrogated the premise upon which *Croyden* and *Haberman* stand, and submit the *Devlin* decision to the Court.

In *Devlin v. Scardelletti, et al.*, 2002 WL 1270617, 536 U.S. ___ (2002), the United States Supreme Court directly addresses the issue of whether a unnamed class member, whose motion to intervene was denied at the trial court, has the power to bring an appeal without first intervening. The Court found that, contrary to the position held by some circuits and embraced by *Croyden* and *Haberman*, the issue was not one of standing because appellant had not been successful in intervening, but rather whether the Appellant was a party for purposes of appealing the settlement approval. The *Devlin* Court held that an unnamed class member who had timely objected to approval of a settlement at a fairness hearing has the power to bring an appeal without first intervening, abrogating the precedent of *Croyden* and *Haberman*.

Devlin is directly on point to the situation faced by Appellants. Appellants moved to intervene and were denied by the trial court. They filed timely objections and raised those objections at the fairness hearing. Therefore, Appellants have the power to bring an appeal without first intervening. This Court should not dismiss this appeal.

2. Conclusion

For all of the above reasons, Appellants request that the Court take judicial notice of the recent United States Supreme Court decision which has a direct bearing upon the issues pending in this matter and grant them such other and further relief to which they may be entitled.

Certificate of Service

I, David G. Nixon, do hereby certify that on the 11th day of June 2002 I caused a true and correct photocopy of the within and foregoing document, with exhibits, if any, to be served on those persons shown below via U.S. First Class Mail, to wit:

Hon. John A. Thomas
CLARK COUNTY CIRCUIT JUDGE
P O Box 966
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"s/David G. Nixon"
David G. Nixon

APPENDIX E

U. S. CONSTITUTION, AMENDMENT V. GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONSTITUTION, AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But

Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

A.C.A. § 16-11-302

ARKANSAS CODE OF 1987 ANNOTATED

TITLE 16. PRACTICE, PROCEDURE, AND COURTS

SUBTITLE 2. COURTS AND COURT OFFICERS

CHAPTER 11. SUPREME COURT

SUBCHAPTER 3. PROCEDURAL RULES

16-11-302. Pleading, practice, and procedure in civil cases.

(a) The Supreme Court of Arkansas shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any and all proceedings in civil cases in all courts in this state. However, the court shall not have the power to prescribe rules in conflict with laws of this state relating to stays and continuances of proceedings in suits in which a member of the General Assembly, an officer of the General Assembly, or a designated employee of the General Assembly is an attorney or a party in the proceeding.

(b) The rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by Arkansas Constitution, Article 2, § 7, as amended by Arkansas Constitution, Amendment 16.

(c) The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as authorized in this section may prescribe the times for, and manner of, taking appeals.

(d) The Supreme Court may fix the dates when these rules shall take effect and the extent to which they shall apply to proceedings then pending.

(e) All laws in effect on July 24, 1973, regarding pleading, practice, and procedure in civil proceedings in the courts of

this state and those relating to the time and manner of taking appeals in civil proceedings shall remain in effect only until such time as the Supreme Court prescribes rules regarding them or until the laws are repealed or revised by legislative action.

(f) Nothing in this section, anything herein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules previously prescribed by the Supreme Court.

History. Acts 1973, No. 38, §§ 1-6; 1979, No. 333, § 2; 1981, No. 312, § 3; A.S.A. 1947, §§ 22-245 -- 22-249, 22-249n.

A.C.A. § 16-65-119

ARKANSAS CODE OF 1987 ANNOTATED

TITLE 16. PRACTICE, PROCEDURE, AND COURTS

SUBTITLE 5. CIVIL PROCEDURE GENERALLY

CHAPTER 65. JUDGMENTS GENERALLY

SUBCHAPTER 1. GENERAL PROVISIONS

16-65-119. Reversal, modification, or vacation of judgment.

(a) A judgment rendered, or final order made, in the circuit or chancery court may be reversed, vacated, or modified, either by the Supreme Court or by the court in which the judgment was rendered, or order made.

(b) A judgment or final order may be reversed or modified by the Supreme Court for errors appearing in the record.

(c) The proceedings to obtain the reversal or modification shall be by appeal, prosecuted as prescribed by law.

History. Civil Code, §§ 566-568; C. & M. Dig., §§ 6285-6287; Pope's Dig., §§ 8241-8243; A.S.A. 1947, §§ 29-501 -- 29-503.

RULE 23. CLASS ACTIONS.

* * *

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section may be conditional and it may be altered or amended before the decision on the merits.

(c) Notice. In any class action in which monetary relief is sought, including actions for damages and restitution, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall: (1) describe the action and the members' rights in it; (2) advise each member that the court will exclude the member from the class if the member so requests by a specified date; (3) advise each member that the judgment, whether favorable or not, will include all members who do not request exclusion; and (4) state that any member who does not request exclusion may, if the member desires, participate in the litigation, either in person or through counsel. The cost of such notice shall be borne by the representative parties; provided, however, that the court may shift all or part of such

cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits.

* * *

ARKANSAS RULES OF APPELLATE PROCEDURE - CIVIL

RULE 2. APPEALABLE MATTERS; PRIORITY

(a) An appeal may be taken from a circuit court to the Arkansas Supreme Court from:

1. A final judgment or decree entered by the circuit court;

2. An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action;

3. An order which grants or refuses a new trial;

4. An order which strikes out an answer, or any part of an answer, or any pleading in an action;

5. An order which vacates or sustains an attachment or garnishment;

6. An interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused;

7. An interlocutory order appointing a receiver, or refusing to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder;

8. An order which disqualifies an attorney from further participation in the case;

9. An order granting or denying a motion to certify a case as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure;

10. An order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official;

11. An order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the circuit court has directed entry of a final judgment as to one or more but fewer than all of the claims or parties and has made an express determination, supported by specific factual findings, that there is no just reason for delay, and has executed the certificate required by Rule 54(b) of the Rules of Civil Procedure; and

12. An order appealable pursuant to any statute in effect on July 1, 1979, including Ark. Code Ann. § 16-108-219 (an order denying a motion to compel arbitration or granting a motion to stay arbitration, as well as certain other orders regarding arbitration) and § 28-1-116 (all orders in probate cases, except an order removing a fiduciary for failure to give a new bond or render an accounting required by the court or an order appointing a special administrator).

(b) An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment.

(c) Appeals in juvenile cases shall be made in the same time and manner provided for appeals from circuit court.

1. In delinquency cases, the state may appeal only under those circumstances that would permit the state to appeal in criminal proceedings.

2. Pending an appeal from any case involving a juvenile out-of-home placement, the circuit court retains jurisdiction to conduct review hearings.

3. In juvenile cases where an out-of-home placement has been ordered, orders resulting from the hearings set below are final appealable orders:

(A) adjudication and disposition hearings;

(B) review and permanency planning hearings if the court directs entry of a final judgment as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P., Rule 54(b); and

(C) termination of parental rights.

(d) All final orders awarding custody are final appealable orders.

(e) Appeals in criminal cases have priority over all other business. With respect to civil cases, appeals under subdivisions (a)(6), (a)(7), (a)(9), (c)(3), and (d) of this rule take precedence.

[Effective January 1, 1996; amended effective March 4, 1999; amended effective January 27, 2000; amended effective February 1, 2001; amended effective July 1, 2001.]

APPENDIX F

IN THE SUPREME COURT OF ARKANSAS

[Filed JUL 23, 2002]

TERESA BALLARD, KENISHA BRYANT and CHERYL KING,	**APPELLANTS**
v.	**NO. CA 01-1190**
PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons; and ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC.,	**APPELLEES**

PETITION FOR REHEARING

COME NOW, TERESA BALLARD, KENISHA BRYANT, and CHERYL KING, Appellants herein, and petition the Court for rehearing of their decision entered July 5, 2002, dismissing the Appeal in this matter.

1. Having long held that Arkansas Rule of Civil Procedure 23 will be interpreted in the same manner as its Federal counterpart, the Court now seeks to distinguish portions of Rule 23(b) from its federal counterpart, which will result in inconsistent application of the Rule.

2. At the time Appellants sought to intervene, *Haberman* was controlling, but submit that it is not now controlling because of *Devlin v. Scardelletti, et al.*, 2002 WL 1270617, 122 S. Ct. 2005, 536 U.S. ____(2002).

3. The presence of an opt-out provision does not undermine the power of an unnamed class member, having timely objected but being unsuccessful in intervening, to bring an appeal challenging the fairness of a class settlement. *Henderson v. General American Life Insurance Co.*, 122 S. Ct.2584 (2002).

WHEREFORE, Appellants respectfully request that the Court rehear and reconsider their decision of July 5, 2002 and that they grant the relief requested by the Appellants.

BRIEF IN SUPPPORT OF PETITION FOR REHEARING

COME NOW, TERESA BALLARD, KENISHA BRYANT, and CHERYL KING, Appellants herein, and submit this Brief in support of their Petition for Rehearing filed contemporaneously herewith:

The Court issued its Order on July 5, 2002, dismissing Appellants' appeal in this matter and cited three reasons:

(a) That the United States Supreme Court's decision in *Devlin, infra,* could be distinguished because *Devlin* addressed a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law;

(b) That because Appellants had previously argued that *Haberman, infra,* was controlling as to the issues of intervention and standing, Appellants could not now argue that *Haberman* was not controlling;

(c) That *Devlin* could be further distinguished because the settlement there had not contained any provision for opting-out; therefore, *Devlin*, did not apply and Appellants were without standing to appeal.

Appellants respectfully request that the Court reconsider its July 5, 2002 order for the following reasons.

This Court has long held that Arkansas Rule of Civil Procedure 23 will be interpreted in the same manner as its federal counterpart. *Williamson v. Sanofi Winthrop Pharmaceuticals, Inc.*, 347 Ark 89, 60 S.W.3d 428, 434 (2001) ("Rule 23 of the Arkansas Rules of Civil Procedure is comparable to Rule 23 of the Federal Rules of Civil Procedure, and this court interprets our Rule 23 in the same manner as the federal courts interpret the federal counterpart."); *Fraley v. Williams Ford Tractor and Equipment Co.*, 339 Ark. 322, 336, 5 S.W.3d 423, 432 (1999) ("We have said that we will interpret Ark. R. Civ. P. 23 in the same manner the federal courts interpret the comparable Fed R. Civ. P. 23."); *Union National Bank v. Barnhart*, 308 Ark. 190, 197, 823 S.W.2d 878, 881 (1992) (" in analyzing cases under our old rule, we have held that 'the spirit of the federal rule is to be found in our Rule 23 even if all the words are not,' and that 'both set out the same basic requirements for a class action.'" quoting *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 199, 801 S.W.2d at 36, 39 (1990)). *See also Baker v. Wyeth-Ayerst Laboratories Division*, 338 Ark. 242, 992 S.W.2d 797 (1999) (comparing the similarities between Ark. R. Civ P. 23(b) and Fed. R. Civ. P. 23(b)).

Now with its decision in *Ballard v. Advance America*, _____ Ark. ____, _____ S.W.3d_____ (July 5, 2002), the Court appears to establish a distinction between Ark. R. Civ. P. 23(b) and its federal counterpart. "Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure", but the Court provides no guidance as to which part of Ark. R. Civ. P 23(b) will no longer be interpreted in the "spirit of the federal rule ... even if all the words [are] not [found]."

While it is true that Appellants agreed that at the time intervention was sought that *Haberman* controlled whether an unnamed class member had standing to bring an appeal having been unsuccessful in their motion to

intervene, Appellants believe that *Devlin* has called into question the precedent upon which the *Haberman* decision was based, and Counsel for Appellants have a responsibility to their clients and the Court to bring the issue to the attention of the Court.

Furthermore, the Court's July 5, 2002 Order dismissing this appeal should be reconsidered in light of *Henderson v. General American Life Insurance Co.*, 122 S. Ct. 2584 (2002). In *Henderson*, the Supreme Court of the United States reversed and remanded *In re General American Life Ins. Co. Sales Practices Litigation*, 268 F.3d 627 (8th Cir. 2001) and instructed the Eighth Circuit Court of Appeals to reconsider their dismissal of *Henderson's* appeal in light of *Devlin v. Scardelletti*, 122 S.Ct. 2005 (2002). In *General American*, the Court of Appeals had relied on the *Croyden, infra*, precedent that an unnamed class representative must first intervene and achieve the status of a "party" in order to have standing to appeal the fairness of a class settlement. *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992).

Henderson, an unnamed class member in *General American*, had been denied intervention, had timely objected to the fairness of the settlement, but had not opted out under the settlement opt-out provisions. In *Henderson*, the Supreme Court of the United States did not deny Henderson's ability to appeal the fairness of the settlement based on the availability of opt-out provisions contained in the settlement. In light of the Supreme Court's most recent decisions regarding an unnamed class member's opportunity to appeal the fairness of a settlement, this Court should reconsider and set aside the Order dismissing Appellants' appeal in this matter.

Finally, this petition for rehearing should be granted to clarify the Court's statement that "Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal." The inference is that if Appellants had, in fact, opted-out of the settlement they would have had standing to appeal the fairness of the

settlement. Traditionally, opting-out has removed that person as a class member, and it would seem to *remove* any standing that person might have had to object to or appeal the fairness of a settlement. The statement implies that a person opting out of a settlement - a non-class member - would have the requisite standing necessary to pursue an appeal addressing the fairness of the settlement when an unsuccessfully intervening class member - now subject to the terms of the settlement and the principles of *res judicata* - is denied the same opportunity.

Conclusion

The Court should grant the rehearing, set aside their decision of July 5, 2002 dismissing the appeal, and grant Appellants the relief they have requested.

Certificate of Counsel

The undersigned hereby certifies his belief that there is merit in this Petition for Rehearing and that it is not filed for the purpose of delay.

Respectfully submitted:
"s/David G. Nixon"
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Certificate of Service

I, David G. Nixon, do hereby certify that on the 22nd day of July 2002 I caused a true and correct photocopy of the within and foregoing document, with exhibits, if any, to be served on those persons shown below via U.S. First Class Mail, to wit:

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Supreme Court, U.S.
FILED
FEB 7 2003
OFFICE OF THE CLERK

No. 02-876

IN THE

Supreme Court of the United States

TERESA BALLARD, KENISHA BRYANT
and CHERYL KING,

Petitioners,

v.

PHYLLIS GARRETT and ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

BRIEF IN OPPOSITION FOR RESPONDENT ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Advance America, Cash Advance Centers of Arkansas, Inc., is wholly owned by Advance America, Cash Advance Centers, Inc.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

Statement of Facts 1

Reasons for Denying the Petition 3

I. The Decision Of The Arkansas Supreme Court Does Not Conflict With This Court's Opinion In *Devlin* 4

II. Petitioners Have Misrepresented The Law ... 6

III. No Due Process Or Equal Protection Concerns Are Raised In This Appeal 7

Conclusion 9

TABLE OF CITED AUTHORITIES

Page

Cases:

Devlin v. Scardelletti, et al., 536 U.S. 1, 122 S. Ct. 2005 (2002) ..... *passim*

Haberman v. Lisle, 884 S.W.2d 262, 318 Ark. 177 (1994) 2-3

Henderson v. Gen. Am. Life Ins. Co., 122 S. Ct. 2584 (2002) 6, 7

In re Gen. Am. Life Ins. Co. Sale Practices Litigation, 302 F.3d 799 (2002) 7

Rules:

Arkansas Rule of Civil Procedure 24(a) ..... *passim*

Federal Rule of Appellate Procedure 4 8

Federal Rule of Civil Procedure 23(b)(1) 5

Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America") submits this Opposition to the Petition for Writ of Certiorari filed by Petitioners Teresa Ballard, Kenisha Bryant and Cheryl King (the "Petition"). Petitioners ask this Court to review the judgment of the Arkansas Supreme Court dismissing their appeal from a trial court order approving a class action settlement to which they objected. For the following reasons, the Petition should be denied.

STATEMENT OF FACTS

The underlying class action was filed on October 12, 1999. After eighteen months of contentious litigation, and two interlocutory appeals to the Arkansas Supreme Court, the parties were able to negotiate a proposed settlement. On April 9, 2001, the trial court certified a conditional settlement class. On May 2, 2001, the trial court preliminarily approved the proposed class action settlement and the form of notice to be sent to potential class members notifying them of the settlement. Court approved notice of the proposed settlement was mailed to over 19,000 potential class members. The notice informed potential class members that a fairness hearing would be held on July 18, 2001, and that they were given until June 30, 2001, to opt out of the class, or be bound by the settlement if approved by the trial court.

On July 6, 2001, Petitioners filed a motion seeking to intervene in this case for the purpose of objecting to the proposed settlement. On July 16, 2001, the trial court held a hearing on Petitioners' motion to intervene. After hearing argument from counsel, the trial court denied Petitioners' motion finding it to be untimely and concluding that the class members' interests were adequately represented by class counsel.

On July 18, 2001, the trial court held the final settlement hearing, at which Petitioners appeared through their counsel, offered evidence and were permitted to argue their objections to the proposed settlement. The trial court approved the settlement over Petitioners' objections, and entered a Final Judgment and Order of Dismissal on July 18, 2001. (App. B).

Petitioners then appealed the trial court's denial of their motion to intervene to the Supreme Court of Arkansas. The Arkansas Supreme Court affirmed the trial court's order denying Petitioners' motion to intervene finding that: (1) Petitioners waited until the litigation had progressed too far before they filed their motion to intervene; (2) granting Petitioners' motion to intervene would have caused the other parties to the litigation to suffer prejudice; and (3) Petitioners failed to provide a valid reason for their delay in filing their motion to intervene. *See Ballard v. Garrett*, 78 S.W.3d 73, 77, 349 Ark. 371, 379 (2002).

Petitioners then filed a second appeal challenging the trial court's final order approving the settlement agreement.[1] The Supreme Court of Arkansas found that Petitioners lacked standing to bring this appeal because they failed to timely intervene in accordance with Rule 24(a) of the Arkansas Rules of Civil Procedure. (App. A). In reaching its decision, the Arkansas Supreme Court stated that this Court's decision in *Devlin v. Scardelletti, et al.*, 536 U.S. 1, 122 S. Ct. 2005 (2002) involves facts and issues that are distinguishable from those presented in Petitioners' appeal and therefore *Devlin* was not controlling. (App. A). Rather, *Haberman v. Lisle*,

1. In total, Petitioners have filed three separate appeals with the Supreme Court of Arkansas and two Petitions for Writ of Certiorari in this Court.

884 S.W.2d 262, 318 Ark. 177 (1994) continues to be the controlling precedent with respect to state class action in Arkansas courts. (App. A).[2]

On July 23, 2002, Petitioners asked the Arkansas Supreme Court to reconsider its dismissal of their appeal of the trial court's order approving the settlement agreement. (App. F). The Petition for Rehearing was denied on September 5, 2002. (App. C). Petitioners filed their Petition for Writ of Certiorari with this Court on December 4, 2002.[3]

REASONS FOR DENYING THE PETITION

The Petition should be denied for several reasons. First, the judgment of the Arkansas Supreme Court does not conflict with this Court's holding in *Devlin v. Scardelletti*. In *Devlin*, this Court held that unnamed class members, who have timely objected to approval of a federal class action settlement, may appeal the settlement approval without first intervening. *See Devlin*, 122 S. Ct. at 2013. However, *Devlin* does not hold, as Petitioners argue, that timely objectors to state class action settlements are "parties" or may stand in the shoes of "parties" for all purposes and on all issues. Additionally, as the Supreme Court of Arkansas recognized, *Devlin* involves facts and issues that are distinguishable from those presented in this Petition. (App. A).

---

2. Prior to June 12, 2002, Petitioners conceded that *Haberman* is the applicable and controlling law in Arkansas. (App. A).

3. This is the second Petition for Writ of Certiorari filed by Petitioners *in this action*. The first Petition was denied by this Court on January 13, 2003 (Docket No. 02-246). In addition, Petitioners filed a Petition for Writ of Certiorari in a similar, but unrelated action, challenging the fairness of that settlement agreement. That Petition was also denied by this Court on January 13, 2003. (Docket No. 02-542).

Second, the Appellate Rules of the Arkansas Supreme Court do not deny equal protection or due process to Petitioners and similarly situated litigants. What Petitioners attempt to portray as a denial of due process and equal protection is in reality nothing more than a consequence of poor litigation strategy by them. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, Petitioners willingly undertook the risk that their motion to intervene might be denied for failure to satisfy the requirements of Rule 24(a) of the Arkansas Rules of Civil Procedure, and that they would be bound by the terms of the settlement as approved by the trial court. It is Petitioners' strategic election to intervene rather than opt out of the settlement, as well as their failure to satisfy Rule 24(a) of the Arkansas Rules of Civil Procedure, that resulted in dismissal of their appeal.

I.

THE DECISION OF THE ARKANSAS SUPREME COURT DOES NOT CONFLICT WITH THIS COURT'S OPINION IN *DEVLIN*

There is no conflict between the decision of the Arkansas Supreme Court denying Petitioners' appeal of the settlement and this Court's decision in *Devlin*. In *Devlin*, the Court was faced with the question of whether an objector, who did not have the ability to opt out of a federal class action settlement, must first intervene in order to appeal the district court's approval of the settlement over his timely objections. The Court held that unnamed class members, who have timely objected to approval of a federal class action settlement, may appeal the settlement approval without first intervening. *See Devlin*, 122 S. Ct. at 2013. However, *Devlin* does not

hold, as Petitioners argue, that timely objectors to state class action settlements are "parties" or may stand in the shoes of "parties" for all purposes and on all issues.

As the Arkansas Supreme Court correctly recognized, *Devlin* involves facts and issues that are distinguishable from those presented in this Petition. Unlike *Devlin* which addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, this case (and this Petition) involve a question of law and procedure arising under the Arkansas Rules of Civil Procedure. Thus, the Petition before this Court raises questions of Arkansas state law and procedure in Arkansas state courts.

Another distinguishing factor is that a significant concern for the majority in *Devlin* was the right of unnamed class members, who had timely objected to a settlement, to protect their own interests in a settlement by which they would be bound. *See Devlin*, 122 S. Ct. at 2011. This was a particular concern in *Devlin* because the federal class action had been certified under Rule 23(b)(1) of the Federal Rules of Civil Procedure, so the objecting class member did not have the ability to opt out of the settlement. *See id.* Because he was not able to opt out of the class, appealing the approval of the settlement was the only means by which the objector could protect himself from being bound by a settlement to which he objected. *See id.*

Unlike the objecting class member in *Devlin*, Petitioners here had the ability to opt out of the settlement and avoid being bound by it. Indeed, the Petitioners were ideally positioned to opt out of the settlement because they already had their own action pending against Advance America for the same relief as sought by the class representative in this

litigation.[4] By attempting to intervene at the last minute, rather than opt out of a settlement to which they objected, Petitioners willingly undertook the risk that their motion to intervene might be denied for failure to meet the requirements of Rule 24(a) of the Arkansas Rules of Civil Procedure. Petitioners' strategic election not to opt out of the settlement, plus their failure to meet the requirements of Arkansas Rule of Civil Procedure 24(a), further distinguishes this matter from *Devlin*.

II.

PETITIONERS HAVE MISREPRESENTED THE LAW

Petitioners assert that this Court held on June 17, 2002 that the presence of an opt out provision was "a distinction without a difference". Petition at 9. In apparent support of their statement Petitioners cite to *Henderson v. Gen. Am. Life Ins. Co.*, 122 S. Ct. 2584 (2002). However, *Henderson* does not stand for the proposition advanced by Petitioners. Rather, the *Henderson* opinion cited by Petitioners simply remanded the case to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Devlin*. *See id.*

4. At the time they moved to intervene, the Petitioners were named plaintiffs in another putative class action against Advance America. *See Ballard, et al. v. AA Check Cashiers, et al.*, No. CIV-00-5100 (W.D. Ark. 2000). That case was dismissed by the district court in November 2000 for failure to state a claim and for lack of subject matter jurisdiction. Petitioners were appealing that dismissal to the U.S. Court of Appeals for the Eighth Circuit at the time they sought to intervene in this matter. The Eighth Circuit Court of Appeals later affirmed the dismissal by the district court. *See Ballard, et al. v. AA Check Cashiers, et al.*, 19 Fed. Appx. 468, 2001 WL 1117558 (8th Cir. 2001).

Moreover, Petitioners' neglect to mention that upon reconsideration, the Eighth Circuit indicated that it believed limiting the application of *Devlin* to cases of mandatory class actions "has considerable merit." *See In re Gen. Am. Life Ins. Co. Sale Practices Litigation*, 302 F.3d 799, 800 (2002)[5]. Therefore, Petitioners' contention that this Court held in *Henderson* that the presence of an opt out provision was a distinction without a difference is unsupported and untrue.

III.

NO DUE PROCESS OR EQUAL PROTECTION CONCERNS ARE RAISED IN THIS APPEAL

There are no due process or equal protection concerns raised in this appeal. Rather, what Petitioners attempt to characterize as a denial of due process or equal protection is in reality a thinly-veiled attempt to camouflage poor litigation strategy by Petitioners and their counsel.

Petitioners claim they have been denied due process and equal protection because the Arkansas rules of procedure and appellate standing are being applied to subject them to obligations in its judicial system, while denying them access to the appellate courts. *See* Petition at 15. However, it is Petitioners' failure to satisfy the requirements of the rules, not the rules themselves, which resulted in the dismissal of their appeal. Petitioners' failure to satisfy the requirements of Rule 24(a) of the Arkansas Rules of Civil Procedure prevented them from having standing to appeal the order of the trial court. (App. A). Rather than acknowledge their

5. The Eighth Circuit was not required to determine the impact of *Devlin* in *Henderson* because Henderson's case became moot in the months since the court's first decision. *See id.* at 800.

failure to comply with the rules, Petitioners' instead blame the rules and attempt to manufacture due process and equal protection concerns.

Clearly, Petitioners' failure to satisfy Rule 24(a), the same rule all similarly situated litigants are required to satisfy, does not constitute a violation of due process or equal protection. Under Petitioners' logic, their failure to timely appeal an order of a district court within the thirty-day period required by Rule 4 of the Federal Rules of Appellate Procedure would also give rise to due process and equal protection violations. It is Petitioners' failure to comply with the rules, not the rules themselves, that has prevented Petitioners from having standing.

Moreover, in raising due process and equal protection concerns, Petitioners fail to acknowledge that they were ideally situated to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief sought by the class representative in this action. (App. A). Petitioners could have opted out of the settlement in this action and continued pursuing their own action against Advance America.

Instead, Petitioners elected to abandon their own claims against Advance America and attempt to intervene in this action at the last minute. By doing so, Petitioners willingly undertook the risk that their motion to intervene might be denied for failure to satisfy Rule 24(a) of the Arkansas Rules of Civil Procedure, and they would be then bound by the settlement as approved by the trial court. Having lost the gamble, Petitioners should not be heard now to say their unsuccessful attempt to intervene is "good enough" to confer standing upon them to appeal the settlement.

CONCLUSION

For all of the foregoing reasons, Advance America respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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